

12th day of February, 2002

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-61/51108

PRELIMINARY RECITALS

Pursuant to a petition filed November 7, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Trempealeau County Dept. of Social Services in regard to the spousal impoverishment provisions of medical assistance, a hearing was held on December 10, 2001, at Whitehall, Wisconsin. The record was left open for 23 days at the request of the petitioner.

The issue for determination is whether the petitioner's spouse is entitled to increase his asset limit above that generally allowed by the spousal impoverishment provisions of the medical assistance program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Terrence Madden, Attorney
Kostner, Koslo & Brovold
108 West Main Street
Arcadia, WI 54612

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Richard Wallinger, ESS
Trempealeau County Dept Of Social Services
36245 Main St.
PO Box 67
Whitehall, WI 54773-0067

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Trempealeau County.
2. The petitioner lives in a nursing home. Her husband lives in at home in the community.
3. The petitioner receives \$268 from social security and \$26 from an annuity each month. Her husband receives \$689 from social security and \$48 from an annuity each month. In addition, they receive a total of \$282.24 from a land contract each month.
4. The petitioner and her husband have \$268,797.38 in assets.

5. The petitioner and her husband have a variety of certificates of deposits, money market funds and savings account containing a total of \$212,161.92.
6. The petitioner and her husband have over \$55,000 in assets from which they are unable to account for any income.
7. On November 5, 2001, the petitioner and her husband gave \$40,000 to their children without receiving anything in return.
8. The petitioner seeks relief from the spousal impoverishment asset limit so that her assets can be used to raise her husband's income.

DISCUSSION

The petitioner seeks medical assistance under the spousal impoverishment provisions of the medical assistance program. These provisions are meant to provide medical assistance to those institutionalized while allowing the spouse who remains in the community avoid poverty. Couples whose assets are between \$50,000 and \$100,000 may assign \$50,000 to the community spouse, those whose assets are greater than \$100,000 but less than \$174,000 may assign one-half of their total assets, and those whose assets exceed \$174,000 may assign \$87,000. §49.455(6)(b)3, Stats. *MA Handbook*, Appendix §23.4.2. In addition, the institutionalized spouse may keep the regular medical assistance asset limit of \$2,000, which has the effect of increasing the total assets a couple may retain by that amount. §49.47(4)(b)3g, Stats. Nevertheless, if the community spouse's income falls short of his needs, he may request through a fair hearing that the asset limit be increased so that more income can be produced. The administrative law judge must assign sufficient assets to generate "enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance..." §49.455(8)(d), Stats. The minimum monthly maintenance needs allowance currently is the lesser of \$2,175 or \$1,935 plus excess shelter costs. *MA Handbook*, Appendix §23.6.0. Excess shelter costs are shelter costs above \$562.50. *Id.* The petitioner's assets are well above the spousal impoverishment limits, and she requests that she be able to increase her asset limit so that those assets can produce more income for her husband, whose income falls short of the \$1,935 limit.

At the hearing the petitioner did not document her assets or the income that those assets produced, so it was impossible to determine whether the petitioner was entitled to increased assets. I left the record open and the petitioner's attorney submitted additional documentation. But this documentation fails to prove that her husband is entitled to retain additional assets. The letter from the attorney states that his clients have \$268,797.38 in assets. An estimate from the county agency differs only in that it includes \$9,655.94 that the attorney states was used to purchase two exempt annuities. But although the petitioner admits she has over \$268,000 in assets, a chart supplied by her attorney to show the return on the various assets lists only \$212,161.92 in assets. Because the purpose of increasing the asset limit is to allow the petitioner's spouse maintain a basic standard of living after the petitioner enters an institution, only resources that generate income can be reallocated at a fair hearing to the community spouse and exempted from the asset limit. §49.455(8)(d), Stats.; DHA Final Decisions No. MRA-70/15380 and No. MRA-68/48394. The petitioner has over \$55,000 in assets that she has failed to account for and thus cannot prove that they produce income. Because she cannot prove they produce income she cannot allocate them to her husband.

Even if the petitioner could account for the missing \$55,000, she would still be ineligible for institutional medical assistance. In his letter submitted after the hearing, the petitioner's attorney accounted for certificates of deposit no longer held by the petitioner and her husband by noting that among other things they "were used to fund a gift to the couple's children in the amount of \$40,000 on November 5, 2001." *Attorney Terrence J. Madden letter of December 18, 2001*, p.2. The spousal impoverishment provisions provide public funding to recipients so that the spouse can avoid poverty. It is difficult to see how the taxpayers' help is necessary for those who can afford to give away \$40,000. Wisconsin law protects

public funds by barring institutional medical assistance those who give away assets to become eligible. The petitioner's gift was a divestment because she received nothing in return for the money and it was given away within 36 months of when she entered the nursing home. §49.453(1)(f), Stats. A divestment causes a recipient to be ineligible for reimbursement for institutional care for "the number of months that result from dividing the divested amount ... by the average nursing home cost to a private pay patient (\$4,075)." *MA Handbook*, Appendix, §14.6.0; *See also* HFS 103.065(5), Wis. Adm. Code. The petitioner's divestment alone is enough to render her ineligible for medical assistance for nine months.

CONCLUSIONS OF LAW

1. The petitioner's spouse is ineligible for an increase in the asset limit allowed under the spousal impoverishment provisions of medical assistance because she has not shown that a substantial portion of her assets produce income and because she divested assets.
2. The petitioner is ineligible for institutional medical assistance because her assets exceed those allowed by the program.

NOW, THEREFORE, it is ORDERED

That the petition herein be and the same hereby is dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Eau
Claire, Wisconsin, this _____ day of
_____, 2002.

Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
315/MDO